

RECENT DEVELOPMENTS

HKSAR v. Ma Wai Kwan David & Ors: A Step in the Right Direction

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I. INTRODUCTION

Twenty-two days after the hand-over of Hong Kong, the Court of Appeal for the Hong Kong Special Administrative Region (HKSAR) delivered a momentous decision.¹ The appeal was lodged by three criminal defendants charged with the common law offense of conspiracy to pervert the course of public justice in relation to their trial for robbery.² These criminal defendants raised three of the most important issues involved in Hong Kong's future: whether the common law of the colony survived to be applied in the semi-autonomous region; whether the jurisdiction of the courts of Hong Kong changed after the transition; and whether the Provisional Legislative Council of Hong Kong is a lawful entity. Through independent opinions by Justices Chan, Nazareth, and Mortimer, the Court of Appeal unanimously held that the common law indeed survived the July 1, 1997 transition, subject to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law);³ that the Court's jurisdiction is the same now as it was under British colonial rule; and that the Provisional Legislative Council is a lawful body. *HKSAR v. Ma Wai Kwan David & Ors*, 1997-2 HKC 315, 1997 HKC LEXIS 57 (C.A., July 22, 1997).

1. See *HKSAR v. Ma Wai Kwan David & Ors*, 1997-2 HKC 315, 1997 HKC LEXIS 57 at *13 (C.A., July 22, 1997). The Court of Appeal is the highest court of the HKSAR; both the Court of Appeal and the Court of First Instance form the High Court of the HKSAR. See THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, art. 81 (1990) [hereinafter BASIC LAW]. However, this is pending the establishment of the Court of Final Appeal, which will have the power of final adjudication. See BASIC LAW, *supra*, art. 82.

2. *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *1-2.

3. See generally BASIC LAW, *supra* note 1.

II. BACKGROUND

This ground-breaking decision is rooted in the events of the last fifteen years, beginning with the People's Republic of China (PRC) and the United Kingdom's 1982-1984 negotiations over the disposition of Hong Kong upon the expiration of the U.K.'s ninety-nine year lease for the colony's Kowloon holdings.⁴ The result was the Sino-British Joint Declaration of 1984 (Joint Declaration), which declared the mutual decision to return Hong Kong to China.⁵ Following in the spirit of the Joint Declaration, the Basic Law was promulgated as the constitution of the HKSAR.⁶

The Basic Law was created by two committees formed by the PRC, the Basic Law Drafting Committee and the Basic Law Consultative Committee.⁷ The Basic Law Drafting Committee was composed of thirty-six mainland officials and twenty-three representatives from Hong Kong.⁸ This committee drafted the Basic Law and submitted it for the approval of the National People's Congress (NPC).⁹ The Basic Law Consultative Committee was made up of 180 Hong Kong citizens appointed to sit as an advisory body only.¹⁰ These committee members were all chosen from the business and industry sectors with most opposing the democratization movement and expressing pro-China sentiments.¹¹

The Basic Law institutionalized Deng Xiaoping's policy of "one country, two systems."¹² From 1970-1984, Deng's administration developed the concept of "one country, two systems" as part of the reunification process for Hong Kong, Macao, and the Republic of

4. See Vincent Lau, *Post-1997 Hong Kong: Will Sufficient Educational Autonomy Remain to Safeguard Academic Freedom?* 20 B.C. INT'L & COMP. L. REV. 187, 192 (citing The Convention of Peking, June 9, 1898, China-Gr. Brit., reprinted in NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 246-47 (1991)). While the island of Hong Kong had been ceded to the United Kingdom in perpetuity, the UK agreed to return it along with the New Territories to PRC control. In 1898, Great Britain negotiated the 99-year lease of the New Territories on the Kowloon peninsula. The lease was confirmed by the Convention of Peking. See *id.* at 191 n.29.

5. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, initiated Sept. 26, 1984, Gr. Brit.-P.R.C., 23 I.L.M. 1371 [hereinafter Joint Declaration].

6. See generally BASIC LAW, *supra* note 1.

7. See MING K. CHAN & DAVID J. CLARK, THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY & PROSPERITY" UNDER CHINESE SOVEREIGNTY? 7 (Ming K. Chan & David J. Clark eds., 1991).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See ENBAO WANG, HONG KONG 1997: THE POLITICS OF TRANSITION 41 (1995).

China.¹³ The policy is that “socialism and capitalism will coexist under the central authority of the government in Beijing, and Hong Kong, Macao, and Taiwan will be peaceful subdivisions of a reunified China.”¹⁴ The Preamble of the Basic Law explicitly states the PRC’s intention:

[U]pon China’s resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China, and that under the principle of “one country, two systems,” the socialist system and policies will not be practised in Hong Kong.¹⁵

Article 1 reasserts China’s sovereignty and declares the HKSAR an “inalienable part” of the PRC.¹⁶ Article 2 provides a “high degree of autonomy” to the HKSAR.¹⁷ Article 5 asserts the “one country, two systems” policy by stating that socialism will not be imposed upon Hong Kong, and that “the previous capitalist system and way of life shall remain unchanged for 50 years.”¹⁸ In conjunction with Article 5, Article 8 perpetuates “the laws previously in force in Hong Kong,” expressly incorporating the common law, rules of equity, past legislation, and customary law.¹⁹ Excepted are those laws declared to contravene the Basic Law.²⁰

The Basic Law delineates the HKSAR’s relationship to the government in Beijing. Article 12 states that Hong Kong is a “local administrative region” within the PRC, which comes “directly under the Central People’s Government.”²¹ This is reinforced by Article 22, which states that no “department” of the Central Government, province, autonomous region, or municipality of China has the power to interfere with matters that the HKSAR administers in accordance with the Basic Law.²² Article 18 reiterates Article 8 by stating that the “laws previously in force” shall be the law of the HKSAR.²³

13. *Id.* at 41-42.

14. *Id.* at 42.

15. BASIC LAW, *supra* note 1, preamble.

16. *See id.* art. 1.

17. *See id.* art. 2.

18. *See id.* art. 5.

19. *See id.* art. 6.

20. *See id.* art. 8.

21. *See id.* art. 12.

22. *See id.* art. 22.

23. *See id.* art. 18.

The Basic Law also addresses the nature of the Hong Kong judiciary under PRC rule.²⁴ Article 19 vests in the HKSAR “independent judicial power, including that of final adjudication.”²⁵ The courts have jurisdiction over “all cases in the region,” subject to the restrictions imposed by the legal system previously in force.²⁶

The Basic Law also deals with the political structure of the HKSAR. The Hong Kong Legislature is the subject of Article 68. This article states:

The Legislative Council . . . shall be constituted by election. The method for forming the Legislative Council shall be specified in the light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.²⁷

Annex II to the Basic Law sets out the method for constituting the Legislative Council, which is to have sixty members.²⁸ Annex II is only relevant after the First Legislative Council has been formed.²⁹ Furthermore, the first Council is to be established according to the NPC Decision on that issue.³⁰

Chapter IV, Section 4 of the Basic Law concerns the Judiciary of the HKSAR. Article 81 articulates the perpetuation of the status quo: “The judicial system previously practiced in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal.”³¹ The Court of Final Appeal is to have the power of final adjudication.³²

Article 158 of Chapter VIII is also relevant to the powers of the courts. It provides the authority to interpret provisions of the Basic Law that are “within the limits of the autonomy of the Region” to the judiciary in the context of its adjudication.³³ However, the final authority on interpretation of the Basic Law is the Standing Committee of the NPC, which consults with the Committee for the Basic Law of the HKSAR.³⁴

24. For an analysis of the Basic Law and the HKSAR judicial system, see Ann Jordan, *Lost in the Transition: Two Legal Cultures, The Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335 (1997).

25. See BASIC LAW, *supra* note 1, art. 19.

26. See *id.*

27. BASIC LAW, *supra* note 1, art. 68.

28. See *id.* Annex II.

29. See *id.*

30. See *id.*

31. *Id.* art. 81.

32. See *id.* art. 82. The establishment of the Court of Final Appeal has been the subject of considerable debate and controversy, and, as yet, has not been formed.

33. *Id.* art. 158.

34. See *id.*

Article 160 reaffirms Articles 8 and 18, and preserves the legal system of British Hong Kong to the extent that it does not conflict with the Basic Law: “Upon the establishment of the [HKSAR], the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee . . . declares to be in contravention of this Law.”³⁵

Because the noted case is one of statutory interpretation, the Court relied primarily on only two cases. The first case that the Court cited was *Attorney General of The Gambia v. Jobe*.³⁶ The defendant, Jobe, was arrested in Gambia in 1979 for theft from his employer and false accounting. He was subsequently convicted. Jobe contended that his constitutional rights had been breached. Nonetheless, the action was dismissed. Jobe successfully appealed to the Court of Appeal. The Attorney General appealed the Appellate Court’s decision to the Judicial Committee. In interpreting the Constitution of Gambia, the Judicial Committee advocated a “generous and purposive construction.”³⁷

Madzimbamuto v. Lardner-Burke was the second case that the Court utilized as precedent.³⁸ In 1965, the Prime Minister and other Ministers of the British colony of Rhodesia declared Rhodesian independence.³⁹ The Governor of Rhodesia proclaimed a state of emergency, during which Madzimbamuto was detained by order of Rhodesia’s Minister of Justice and Law and Order.⁴⁰ The issue before the court was whether the order to detain Madzimbamuto was legal, due to the illegality of the usurping government in Rhodesia.⁴¹ In addressing the issue the court also questioned its power to review Parliamentary actions.⁴² The Court declared that it had no power to hold an Act of Parliament invalid or unconstitutional,⁴³ thereby supporting parliamentary sovereignty.

Also relevant to the decision in the noted case is the history of Hong Kong as it prepared for its return to China. The three issues of the noted case may not appear to be dramatic or revolutionary, yet the impact of this decision should be considered significant. While the Joint Declaration and Basic Law both allowed for perpetuation of the past institutions of

35. *See id.* art. 160.

36. *Attorney Gen. v. Jobe* [1984] 1 A.C. 689, P.C. (Gam) (appeal taken before the Privy Council from the Court of Appeal).

37. *See id.* at 700.

38. *Madzimbamuto v. Lardner-Burke and Another*, [1968] All ER 561, P.C. (Rhod.) (appeal taken before the Privy Council from the Appellate Division of the High Court).

39. *Id.* at 561.

40. *Id.*

41. *Id.* at 563.

42. *Id.* at 573.

43. *Id.*

Hong Kong, many in Hong Kong and the international community were skeptical about whether this would, in fact, take place.⁴⁴

The growth of nationalism in the PRC since 1978 has assumed a powerful role in Chinese politics, mixing militarism, Confucianism, and Maoism.⁴⁵ This influence appeared in the PRC's vehement declaration of its sovereign rights to Hong Kong.⁴⁶

The manner in which Beijing prepared for the transition was not comforting to many in the international community.⁴⁷ From 1990 until the transition, China's "not so invisible hand" exerted a restrictive influence over Hong Kong.⁴⁸ Two important moves by Beijing relevant to the noted case involve the Judiciary and the Legislative Council. The Central Government resisted the creation of a Court of Final Appeal, even though the Basic Law calls for such a court.⁴⁹ Beijing also caused apprehension throughout Hong Kong and the international community when it announced in 1995 that the Legislative Council, sitting on June 30, 1997, would dissolve at midnight, when Hong Kong became part of the PRC.⁵⁰ Lu Ping justified the decision by stating that "the new legislature will be entirely composed of Hong Kong people, so Hong Kong people will run Hong Kong."⁵¹ Yet many saw this as an indication that Beijing was planning a "hands-on" administration of the HKSAR.⁵²

This decision created the need for the Provisional Legislative Council challenged in the noted case.⁵³ By dissolving the Legislative Council, the PRC created a void. To fill the legal vacuum, the Preparatory Committee appointed by the PRC decided to create an interim body until elections for the First Legislative Council of the HKSAR could be held.⁵⁴

44. See generally MARK ROBERTI, *THE FALL OF HONG KONG: CHINA'S TRIUMPH & BRITAIN'S BETRAYAL* (1994); Gavin Greenwood, *Running Out of Time*, FAR E. ECON. REV., July 8, 1993, at 16, 17; Louise de Rosario, *Justice under Seige*, FAR E. ECON. REV., Jan. 26, 1995, at 18, 19.

45. See Steven Mufson, *Maoism, Confucianism Blur into Nationalism*, WASH. POST, Mar. 19, 1996, at A1.

46. See Frank Ching, *Split in Beijing over Hong Kong*, FAR E. ECON. REV. Apr. 13, 1993, at 34.

47. For discussion of human rights issues in Hong Kong, see Louise de Rosario, *No Watchdog*, FAR E. ECON. REV., July 7, 1994, at 26.

48. See CHAN & CLARK, *supra* note 7, at 6.

49. See Louis Kraar, *Death of Hong Kong*, FORTUNE, June 26, 1995, at 121.

50. See Nigel Holloway, *Don't Worry, Be Happy*, FAR E. ECON. REV., Apr. 16, 1995, at 21.

51. See Kraar, *supra* note 49, at 122.

52. See *id.* at 123.

53. See *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *44-63.

54. The discussion of the noted case probes the Preparatory Committee's actions more thoroughly. See *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *19-108.

The PRC's influence over Hong Kong in the years before the transition was also apparent in Beijing's vocal condemnation of the Democracy Movement and Hong Kong's desperate attempt to institutionalize human rights before the transition.⁵⁵ The progress made by Governor Patten and Martin Lee's Democracy Party was undermined by Beijing's 1994 declaration that all such measures would be repealed after July 1, 1997.⁵⁶ Some view this as evidence of a trend of disregard and intolerance for human rights and "societal mobilization" in PRC politics since 1993.⁵⁷ This includes a fundamental opposition "to autonomous political mobilization," evident in Beijing's censure of Patten's pre-transition reforms.⁵⁸ While the Basic Law enumerates the fundamental rights of Hong Kong citizens, the PRC's history of human rights violations renders enforcement of Chapter III uncertain.

Relevant to the opposition to reform and democratization is the growth of nationalism in China in recent years. This militant reassertion of national strength has brought with it suspicion and antagonism toward foreign influence over China and its perceived territories.⁵⁹ During the preparation for the return to Chinese rule, it appeared that the Western world was in support of Patten and Lee's democratization of Hong Kong.⁶⁰ This tainted the movement as un-Chinese, causing Lu Ping in 1994 to state, "any foreign government of Hong Kong people trying to exert pressure on the Chinese Government will not succeed."⁶¹ This seemed to be a declaration of China's anti-foreign policies, as well as an indication that there would be no tolerance of foreign influence after July 1, 1997.

It is within the context of this direct involvement from Beijing and of restriction of Hong Kong's domestic autonomy that *HKSAR v. Ma Wai Kwan David & Ors* was delivered. The noted case arrived before the Court of Appeal when three individuals on trial before the Court of First Instance contested the lawfulness of the proceedings against them.⁶² The defendants were charged on August 11, 1995 with the common law offense of conspiracy to pervert the course of public justice.⁶³ They had

55. See de Rosario, *supra* note 47.

56. See David Bachman, *China in 1994: Making Time, Making Money*, ASIAN SURVEY, Jan. 1, 1995, at 45.

57. See *id.* at 39.

58. See *id.* at 46.

59. See Ching, *supra* note 46, at 34; see also Mufson, *supra* note 45, at A1, A12.

60. See Suzanne Pepper, *Hong Kong in 1994: Democracy, Human Rights, and the Post-Colonial Political Order*, ASIAN SURVEY, Jan. 1, 1995, at 53.

61. See *id.* at 54.

62. See *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *14.

63. See *id.*

allegedly offered to pay the mother of one of the defendants, Mr. Wong, in return for his giving false testimony in their trial for robbery.⁶⁴ The indictment was filed January 3, 1997 and trial was set for June 16, 1997.⁶⁵ Trial commenced, and on July 3, 1997 the defendants raised several issues in their defense.⁶⁶ This was three days *after* Hong Kong passed from British to Chinese control, a circumstance upon which the defendants apparently hoped to capitalize. The Deputy Judge of the Court of First Instance passed the issues of the common law's survival, the lawfulness of the Provisional Legislative Council (PLC), and the jurisdiction of the courts up to the Court of Appeal as reserved questions of law, pursuant to the Criminal Procedure Ordinance, § 81.⁶⁷

III. SURVIVAL OF THE COMMON LAW

The first issue before the Court of Appeal was the status of the common law after July 1, 1997. The defendants argued that the common law of the old colonial system was dissolved upon the PRC's reassertion of sovereignty.⁶⁸ The basis for this assertion was the defendants' argument that the common law, perpetuated by the Basic Law, would only become effective upon an affirmative act of adoption by the NPC in Beijing "and/or" the legislature of the HKSAR.⁶⁹ Defendants submitted that there had not been such an affirmative legislative act, and thus the common law offense of conspiracy to pervert the course of public justice could not be charged to them.⁷⁰ The HKSAR position was that the Basic Law did not require any further legislative action to render the common law applicable after July 1, 1997.⁷¹ Rather, the only action required was when a law, previously in force under British colonialism, was found to be in contravention of the Basic Law or PRC Constitution.⁷²

Chief Justice Chan based his decision of this issue on "an interpretation of the provisions of the Basic Law."⁷³ While the Basic Law is the constitutional organ of the HKSAR, it is also a "national law of the PRC."⁷⁴ Justice Chan stressed the policy of "continuity" as vitally

64. *See id.*

65. *See id.* at *13-14.

66. *See id.* at *14.

67. *See id.* at *14-15.

68. *See id.* at *17.

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.* at *18.

73. *See id.* at *18-19.

74. The Basic Law is a national law because Hong Kong is a semi-autonomous region within a unitary, not a federal, system. Articles 1 and 2 of the Basic Law provide the HKSAR

important to the stability and prosperity of Hong Kong as a Special Administrative Region; as such, it is an important issue addressed by the Basic Law.⁷⁵ He also pointed out that the Basic Law is three-dimensional: international, domestic, and constitutional.⁷⁶ This complexity, with the policy concern of “continuity,” led Justice Chan to adopt the HKSAR Government’s position that the “generous and purposive” approach to constitutional interpretation be applied when reading the Basic Law.⁷⁷

In his interpretation of the Basic Law, Justice Chan analyzed the intent behind the constitutional document.⁷⁸ He declared:

Continuity is the key to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system except those provisions which contravene the Basic Law has to continue to be in force. The existing system must already be in place on 1 July, 1997. *That must be the intention of the Basic Law.*⁷⁹

It is with this need for constancy in mind that Justice Chan interpreted Article 160 of the Basic Law as perpetuating the common law through the change in sovereignty.

Article 160 of the Basic Law states, “the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the [NPC] declares to be in contravention of the Law.”⁸⁰ Justice Chan saw the “shall” as meaning “must,” not as meaning “will in the future.”⁸¹ He returned to the policy of continuity, which supports his interpretation of Article 160 as a remedy to any potential vacuum after the transition by bringing the common law across the July 1, 1997 divide.⁸² Thus, Article 160 does not “have the effect of requiring the laws previously in force in Hong Kong to be formally adopted.”⁸³

Justice Chan’s interpretation of “shall adopt” is strengthened by an analysis of the Chinese text of the Basic Law.⁸⁴ The Chinese characters for “adopt” are “clearly used in the mandatory and declaratory sense.”⁸⁵

with a “high degree” of autonomy and executive, legislative, and judicial independence over domestic issues only. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *19-20.

75. *See id.*

76. *See id.* at *21.

77. *See id.*

78. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *24.

79. *See id.* (emphasis added).

80. *See* BASIC LAW, *supra* note 1, art. 160.

81. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *25.

82. *See id.* at *25-26.

83. *See id.* at *26.

84. The Basic law was enacted in both Chinese and in English. The Chinese text prevails over the English version. *See id.* at *28.

The defendants turned to the NPC Decision of February 23, 1997, arguing that the Decision suggested that an affirmative act adopting the common law was required.⁸⁶ Justice Chan found otherwise. The NPC Decision was an exercise of the NPC's right under Article 160 of the Basic Law to declare which of the common laws in force under colonial rule contravene the Basic Law, and thus ceased to be law after the return to Chinese control.⁸⁷

This Decision articulates the opposite of what the defendants argued; it implies that the common law "will automatically become effective as the laws of the HKSAR," except for those laws explicitly excluded as being contrary to the Basic Law.⁸⁸ The repeal of the Application of English Law Ordinance does not support the defendants' argument.⁸⁹ Instead, it supports the HKSAR's contention with which Justice Chan agreed. The NPC repealed this Ordinance because it referred to "imperial acts" of the United Kingdom, which have no place in a Hong Kong governed by China.⁹⁰ The repeal was an act pursuant to Article 160.⁹¹ It validates the position that the common law was passively absorbed by the HKSAR, except when the law was found to contradict the Basic Law, in which case an affirmative act declaring it void is required.⁹²

Justice Chan then turned to an alternative explanation for the survival of the common law, the Hong Kong Reunification Ordinance of 1997.⁹³ Section 5 of the Ordinance provides:

All laws previously in force shall be construed . . . so as not to contravene the Basic Law and to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China "[L]aws previously in force" means the common law, rules of equity, ordinances, subsidiary legislation and customary law in force immediately before 1 July, 1997 and adopted as laws of the [HKSAR]⁹⁴

Section 7 declares that "the common law . . . shall continue to apply."⁹⁵ Justice Chan found that the Reunification Ordinance put the matter "beyond doubt by stating that such laws shall continue to apply."⁹⁶

85. See *id.* at *28-29.

86. See *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *29.

87. See *id.*

88. See *id.* at *30.

89. See *id.* at *31.

90. See *id.*

91. See BASIC LAW, *supra* note 1, art. 160.

92. See *id.* at *31-32.

93. See *id.* at *35.

94. *Id.* at *36-37 (citing Hong Kong Reunification Ordinance (July 1, 1997)).

95. *Id.*

96. *Id.* at *40.

Justice Nazareth agreed with Chief Justice Chan's interpretation of Article 160. He also noted the importance of constancy during the transitional period.⁹⁷ "Given the predominant theme of a seamless transition," a purposive approach to interpreting the Basic Law is best.⁹⁸ Justice Nazareth focused on Articles 8, 18, and 87 of the Basic Law, each of which is echoed by Article 160's perpetuation of the common law.⁹⁹

In one aspect, Justice Nazareth differs from Justice Chan. Justice Chan looked to Article 160 as the portion of the Basic Law which ensured the common law's survival.¹⁰⁰ Justice Nazareth, on the other hand, read Articles 8 and 18 together, and construed Article 8 to perpetuate the common law in Hong Kong.¹⁰¹ Article 160 follows these two, instead of leading them and, thus, in no way can its "shall adopt" language endanger the survival of the common law.¹⁰²

Justice Mortimer's analysis of the common law after July 1, 1997 was also different from that of the Chief Justice, yet reached the same result. Instead of relying on precedent, he stated "the Basic Law is so clear that [the question] can be answered without falling back on these principles of interpretation."¹⁰³ He stated, "There is no doubt that the common law does not apply to the HKSAR after the change of sovereignty unless it is applied to the HKSAR by Chinese law."¹⁰⁴ Yet Justice Mortimer did not mean that an affirmative act of adoption after July 1 was required. Justice Mortimer found that the Basic Law was created pursuant to Article 31 of the PRC Constitution.¹⁰⁵ As such, "it is a Chinese law."¹⁰⁶ Its application of the common law to Hong Kong is effective unless such law is contrary to the Basic Law.¹⁰⁷

IV. JURISDICTION OF THE COURTS OF THE HKSAR

The issue of jurisdiction possessed by the Courts of Hong Kong as a Special Administrative Region was raised by the HKSAR Government in reaction to the defendants' challenge to the lawfulness of the PLC.¹⁰⁸ The HKSAR position was that the Courts have no jurisdiction to hear the issue

97. See *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *76.

98. See *id.* at *76.

99. See *id.* at *72-74.

100. See *id.* at *24-25.

101. See *id.* at *72-73.

102. See *id.* at *73.

103. See *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *111.

104. *Id.* at *106.

105. See *id.* at *109.

106. See *id.*

107. See *id.* at *112.

108. See *id.* at *40.

of the PLC's lawfulness, and must instead "accept the body and the laws made by it [the PLC]" without review.¹⁰⁹

The HKSAR argument rested on Article 19 of the Basic Law, which grants jurisdiction "over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained."¹¹⁰ Article 19 limits this grant, giving the courts no jurisdiction over "acts of state such as defense and foreign affairs."¹¹¹ This perpetuation of the past system and its restrictions led the HKSAR to rely on dictum from *Madzimbamuto v. Lardner-Burke*:¹¹²

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things But that does not mean that [it is] beyond the power of Parliament to do such things. If Parliament chose to . . . the courts could not hold the Act of Parliament invalid.¹¹³

Thus, as long as the Court finds that the PLC was established according to the authority of the sovereign NPC, the Court has no jurisdiction to review the validity of the action.¹¹⁴

The defendants' argument was that the Courts of Hong Kong have jurisdiction to interpret and examine the Basic Law and acts of the NPC to determine if they are consistent with the basic policies of the PRC.¹¹⁵ This extends to determining the PLC's lawfulness.¹¹⁶ They also contend that analogies to past British colonial systems are inappropriate for the HKSAR.¹¹⁷

Justice Chan adopted the HKSAR Government's argument, stating that "[t]here is simply no legal basis" for allowing a regional court to review the validity of the legislation and acts of the sovereign government.¹¹⁸ He again cited the NPC as "the highest organ of state power," that exercises the legislative powers of the PRC government.¹¹⁹ As such, the NPC is beyond judicial review. Justice Chan agreed that the HKSAR Courts could not challenge the validity or reasoning of NPC

109. *See id.* at *40-41.

110. *Id.* (quoting BASIC LAW, *supra* note 1, art. 19).

111. In the case of questions involving these acts of state, the Courts are to apply to the Chief Executive for a "certificate," considered a binding decision on the matter. *See* BASIC LAW, *supra* note 1, art. 19. Before delivering this certificate, the Chief Executive must secure a similarly binding certificatory decision from the Central Government. *See id.*

112. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *41-42.

113. *Madzimbamuto*, [1968] 3 All ER 561 at 573.

114. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *42.

115. *See id.* at *43.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.* at *44.

actions, because “acts of the Sovereign and their validity are not open to challenge by the regional courts.”¹²⁰

Justice Chan did find that the courts had jurisdiction to “examine the existence [as opposed to the validity] of the acts of the Sovereign or its delegate.”¹²¹ In the context of this limited jurisdiction, the Court was empowered to examine whether there was NPC authorization of the Preparatory Committee, whether there was a decision/resolution by the Preparatory Committee to set up the PLC, whether the Preparatory Committee actually established the PLC, and whether it was pursuant to NPC decisions on the matter.¹²² This done, the Court could not go further.¹²³

Justice Nazareth went into more detail in determining the issue of jurisdiction, examining Article 158 of the Basic Law as directed by the HKSAR Government’s argument.¹²⁴ While this article reserves the power to interpret the Basic Law to the Standing Committee of the NPC, it allows the Courts of the HKSAR to interpret “provisions of this Law which are within the limits of the autonomy of the Region” while adjudicating cases.¹²⁵ It is within this limited power to interpret the Basic Law that the Court may consider the PLC’s conformity with that Law.¹²⁶

Based upon Article 19’s continuation of the past legal system, Justice Nazareth recognized the acceptance of four concepts from the colonial era.¹²⁷ The first is the doctrine of parliamentary sovereignty, a concept held to by Justice Chan in his analysis.¹²⁸ The second concept is the principle of constitutional hierarchy.¹²⁹ Justice Nazareth refers to an example proposed by the solicitor general: the fact that Acts of Parliament and ministerial decisions were not subject to the Hong Kong Letters Patent.¹³⁰ The third concept is that the British legal system was not the Hong Kong legal system.¹³¹ Thus, the legal system of Hong Kong was perpetuated over the system of the United Kingdom. The fourth concept is that no remedy is available, as acts of the sovereign are beyond the courts’ jurisdiction.¹³²

120. *See id.* at *45.

121. *See id.*

122. *See id.* at *46.

123. *See id.*

124. *See id.* at *81-82.

125. *See* BASIC LAW, *supra* note 1, art. 158.

126. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *83.

127. *See id.* at *83-84.

128. *See id.*

129. *See id.*

130. *See id.* at *83.

131. *See id.* at *84.

132. *See id.*

Having accepted these principles, Justice Nazareth stated that “the Preparatory Committee is a creature of the sovereign” and, as such, lies beyond the scope of the courts’ jurisdiction.¹³³ Thus, the Court cannot review the constitutionality of the PLC as an action by the Preparatory Committee, and thereby of the NPC.¹³⁴

V. LAWFULNESS OF THE PROVISIONAL LEGISLATIVE COUNCIL

The defendants, having failed with their common law argument, challenged the Provisional Legislative Council’s (PLC) lawfulness as a legislative body.¹³⁵ Their first argument was that the Joint Declaration and Article 68 of the Basic Law provided for a Legislative Council “constituted by election.”¹³⁶ As there has been no election since July 1, 1997, the PLC is not an elected body. Consequently, the PLC does not comply with statutory requirements and is, therefore, an unlawful body.

The defendants also submitted that the PLC is in fact the de facto “First Legislative Council” and, as such, must comply not only with the Joint Declaration and Basic Law, but also with Annex II of the Basic Law, and with the April 4, 1990 NPC Decision.¹³⁷ Annex II states, “In the first term, the Legislative Council shall be formed in accordance with the ‘Decision of the [NPC] on the Method for the Formation of the First Government and the First Legislative Council of the [HKSAR].’”¹³⁸ That Decision was adopted on April 4, 1990 by the Seventh National People’s Congress, the same day the NPC adopted the Basic Law.¹³⁹ The defendants added that the April 4, 1990 NPC Decision does not refer to a “Provisional” Council in its Order to form the first Government of the HKSAR.¹⁴⁰ Thus, because there have been no elections, and because the Decision did not call for a provisional measure, the PLC does not comply with the statutory requirements and is, therefore, unlawful.¹⁴¹

133. *See id.* at *84-85.

134. *See id.* at *85.

135. The competency of the PLC as the legislature of the HKSAR was reaffirmed by the Hong Kong Court of First Instance in *Cheung Lai Wah (an infant) & Ors. v. Director of Immigration*, in which the Court declined to address the issue “in view that a recent challenge was addressed by the Court of Appeal” in the noted case. *Cheung Lai Wah & Ors. v. Director of Immigration*, 1997 HKC LEXIS 132 at *12.

136. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *48.

137. *See id.* at *49.

138. *See* BASIC LAW, *supra* note 1, Annex II, § I(1).

139. Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, adopted Apr. 4, 1990.

140. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *49.

141. *See id.*

The defendants also argued that if the April 4, 1990 Decision has any legislative effect, it would act as an amendment to the Basic Law and, as such, must comply with Article 159.¹⁴² Since the Decision was not rendered according to the procedures in Article 159, the defendants challenged its validity.¹⁴³

The August 31, 1996 Decision of the NPC is cited by the defendants as well.¹⁴⁴ They contended that this Decision afforded the Preparatory Committee powers only to form the First Legislative Council and Government.¹⁴⁵ The defendants then turned to the Preparatory Committee's March 24, 1996 Decision regarding the establishment of the PLC.¹⁴⁶ That Decision "fails to mention" the Preparatory Committee's "obligation to prescribe the method for the formation of the first Legislative Council in accordance with the 1990 NPC Decision."¹⁴⁷ The defendants' argument essentially was that "the Preparation Committee did not have powers to do what they did."¹⁴⁸

Justice Chan did not agree with the defendants' arguments.¹⁴⁹ His analysis of the lawfulness of the PLC rests upon China's sovereignty. "The NPC is the highest state organ of the PRC which is the Sovereign of the HKSAR."¹⁵⁰ The Preparatory Committee's powers flowed from the NPC's 1990 and 1994 Decisions regarding the establishment of the HKSAR government after the transition.¹⁵¹ Justice Chan viewed it as "clearly within the authority and powers of the Preparatory Committee to do acts which are necessary and incidental to the preparation of the establishment of the HKSAR."¹⁵² The Preparatory Committee, having found that a First Legislative Council would not be formed upon the return to Chinese rule, created a provisional legislature in December, 1996.¹⁵³

The HKSAR position is that the PLC is not the First Legislative Council.¹⁵⁴ Rather, the HKSAR argued that the PLC has limited powers

142. *See id.* at *49-50. The opinion actually cites Article 158, which governs jurisdiction for interpretation of the Basic Law, while Article 159 governs amendment to the Basic Law. *See id.*

143. *See id.* at *50.

144. *See id.*

145. *See id.*

146. *See id.*

147. *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57, at *50.

148. *See id.*

149. *See id.* at *65-66.

150. *Id.* at *57-58.

151. *See id.* at *58.

152. *Id.*

153. *See Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57 at *58.

154. *See id.*

and will only operate until the First Council is formed, no later than June 30, 1998.¹⁵⁵ The PLC was formed to ease the transition by assisting the HKSAR government until the First Legislative Council is established; it is “an interim measure out of necessity.”¹⁵⁶ The PLC is not a breach of the Basic Law; it was intended to implement the Basic Law and the NPC’s Decisions.¹⁵⁷ As the sovereign power of Hong Kong, the NPC has the power to employ such a measure.¹⁵⁸

Justice Chan’s logic regarding the authority and powers of the Preparatory Committee is drawn from the NPC’s 1990 and 1994 Decisions.¹⁵⁹ The NPC’s 1990 Decision authorized the Preparatory Committee to determine the means for establishing the First Legislative Council and Government of the HKSAR. The subsequent 1994 Decision provided the Preparatory Committee with the power to organize the First Legislative Council. The Preparatory Committee chose to create an interim body to allow the HKSAR government to function during this transition, until the Legislative Council could be formed, presumably by election. “This is within the ambit of the authority and powers” conferred to the Preparatory Committee by the sovereign NPC, such that the PLC was legally established.¹⁶⁰

Justice Chan found support for the lawfulness of the PLC in the Eighth National People’s Congress’s ratification of the PLC.¹⁶¹ On March 14, 1997, the entire NPC, including all Committees, adopted the Preparatory Committee’s plan for the PLC.¹⁶² This express ratification is “a sovereign act,” the lawfulness of which is beyond judicial review.¹⁶³

Justice Nazareth also found the PLC to be a lawful body.¹⁶⁴ His analysis noted at the outset that, upon the transition of control, the legislative council of the colony was dissolved and nothing stood to assume its place. As the sovereign of Hong Kong, “it was for the PRC to fill the legal vacuum.”¹⁶⁵ Justice Nazareth found that the April 4, 1990

155. *See id.* at 58. The PLC’s powers are to enact laws “essential for the normal operation of the HKSAR” and to amend and repeal laws in accordance with the Basic Law; to approve budgets and the assessment of taxes; to receive and debate the Chief Executive’s policy address; to endorse the appointment of judges; to nominate six members to the Committee for the Basic Law under the Standing Committee of the NPC, and to handle matters “that have to be dealt with” before the formation of the first Legislative Council. *See id.* at *58-59.

156. *See id.* at *59-60.

157. *See id.* at *59-60.

158. *See id.* at *60.

159. *See id.* at *60-61.

160. *See id.*

161. *See id.* at *61.

162. *See id.*

163. *See id.* at *65.

164. *See id.* at *90.

165. *See id.*

and August 8, 1994 Decisions of the NPC “must be regarded as legislation or enactments.”¹⁶⁶ These pronouncements enabled the Preparatory Committee to form the HKSAR government and legislature, such that its purpose of filling the legal vacuum could take effect.¹⁶⁷

In interpreting Chinese law and the Basic Law, Justice Nazareth returned to the issue of a “smooth transition.”¹⁶⁸ He believed that the need for constancy required a purposeful construction of the law.¹⁶⁹ Because the First Legislative Council could not be formed in time to fill the void created by the change in sovereignty, the Preparatory Committee created the PLC to ease the transition of Hong Kong from a colony to a Special Administrative Region. This course of action was “reasonably necessary and within the scope of the duty and concomitant power under the two NPC Decisions.”¹⁷⁰ Thus, it must be “regarded as valid under Chinese law.”¹⁷¹

Like Justices Chan and Nazareth, Justice Mortimer viewed the NPC Decisions as the enabling acts, the authority of which “covers the power to form the Provisional Legislative Council.”¹⁷² Any doubt as to the validity of the Preparatory Committee’s exercise of these powers to form the PLC was “removed on 14 March 1997 when the NPC resolved to approve [the] Preparatory Committee’s report which . . . detailed the way in which the provisional legislature had been established.”¹⁷³

VI. IMPACT OF HKSAR v. MA WAI KWAN DAVID & ORS

The noted case was decided less than a month after the transition. Given China’s methods of governing and the active role it exerted during the years before it regained control of Hong Kong, it is reasonable to assume Justices Chan, Nazareth and Mortimer did not act without at least tacit approval from the Chief Executive of the HKSAR, as well as the administration in Beijing. Thus, *HKSAR v. Ma Wai Kwan David & Ors* can be viewed as a statement of PRC intent toward its new acquisition.

To view the decision as being indicative of Beijing’s plan of action does not stem from distrust of the PRC alone. The mainland Chinese conception of law and the justice system differs from Western common law conceptions.¹⁷⁴ Combined with the state of affairs in China during

166. *See id.* at *92.

167. *See id.* at 91-92.

168. *See id.* at *93.

169. *See id.* at 93-94.

170. *Id.* at *95.

171. *See id.* at *95-96.

172. *See id.* at *120.

173. *Id.* at *125.

174. *See Jordan, supra* note 24.

this chaotic period of growth and change, there is enough evidence to support the position that the noted case is a declaration of policy.

China's legal culture can be characterized as unique. Until the Communist ascendancy, the Chinese legal system was grounded in the Confucian code of conduct, which was considered morally superior to the system of punishment for criminal acts.¹⁷⁵ The Communist regime adopted a civil law system, yet the Confucian ideals and cultural distrust of law remained.¹⁷⁶ Albert Chen also credited Marxism with the failure of the civil law system in China; Marxist-Leninist ideology holds that bourgeoisie law is a tool of oppression and, therefore, must be distrusted.¹⁷⁷ By contrast, Socialist law protects the masses because the Party controls the legal system.¹⁷⁸ The result has been rule by law instead of rule of law.¹⁷⁹

Following this Party control of law in China is the lack of judicial independence.¹⁸⁰ Judges in the PRC are bureaucrats within the civil service.¹⁸¹ These judges do not have the same kind of job security enjoyed by U.S. judges; even the judges on the Supreme People's Adjudicatory Organ have tenuous positions.¹⁸² In addition, the judiciary does not constitute a separate branch of PRC government. Instead, it functions within the sphere of the Chinese Communist Party, the NPC, and the Standing Committee.¹⁸³ Further, PRC judges are under the Supreme People's Adjudicatory Organ's supervision, and the Supreme People's Adjudicatory Organ is directly responsible to the NPC and Standing Committee.¹⁸⁴ Under this framework, Beijing's policies become an important part of the Chinese justice system.

Whether this mainland conception of law has seeped into Hong Kong is an important element in the examination of the HKSAR legal system. Wu Jianfan, a legal advisor to the PRC and member of the Basic Law Drafting Committee, Preliminary Working Committee, and Preparatory Committee, stated that Hong Kong should not worry because the Standing Committee of the NPC will only have the power to interpret

175. *See id.* at 338; *see also* VICTOR FALKENHEIM & ILPYONG KIM, CHINESE POLITICS FROM MAO TO DENG 204 (Victor Falkenheim & Ilpyong Kim eds., 1989).

176. *See* Jordan, *supra* note 24.

177. *See id.* (citing Albert H.Y. Chen, *Justice After 1997*, in CRIME AND JUSTICE IN HONG KONG 172, 182 (Harold Traver & Jon Vagg eds., 1991)).

178. *See* Jordan, *supra* note 24.

179. *See id.* at 338.

180. *See id.* at 341.

181. *See id.*

182. *See id.* at 342.

183. *See id.* at 343 (citing the Legal Official Law, art. 8(2)) (Chinese law only bars interference of the judiciary from administrative organs, social groups and individuals).

184. *See* Jordan, *supra* note 24, at 343.

the Basic Law in certain areas and will not be able to apply the law.¹⁸⁵ Ann Jordan has interpreted this to mean that the PRC views the HKSAR Judiciary as an independent entity, even though judiciary power is shared with the Standing Committee, because Beijing will not interfere in the determination of cases.¹⁸⁶ Yet Jordan views the PRC's notion of independence as antithetical to the common law conception of an independent judiciary, as it existed under Hong Kong's former system.¹⁸⁷ Jordan's argument is bolstered by the Court of Final Appeal Agreement of June 1995, which conferred upon the PRC government the power to control the manner in which the Court will adjudicate¹⁸⁸ and which limits the composition of the bench.¹⁸⁹

The perpetuation of the common law is significant. First, it demonstrates good faith on the part of the PRC in fulfilling its obligations under the Basic Law. Second, it shows acceptance of a foreign institution, limited by the requirement that it be in harmony with the Basic Law.¹⁹⁰ This is a significant step, since China's interest in preserving national integrity and authority has appeared to depend on denouncing foreign interference and influence on matters of Chinese policy.¹⁹¹ More important, by accepting the common law, China appears to be sending a message to the international business community. Hong Kong is expected by most to facilitate economic growth and modernization in the PRC.¹⁹² This decision affords a sense of continuity and stability, as well as predictability, for business and industry in Hong Kong.¹⁹³ Legal stability is obviously conducive to economic stability and prosperity. Thus, the survival of the common law can be seen as an acceptance of "one country, two systems," or of Beijing's willingness to put economic concerns over political doctrine.¹⁹⁴

185. See *id.* at 346 (citing Wu Jianfan, "Yiguo Liangzhi" de Falu Baozheng—Tan Zhongyang yu Xianggang Tebie Xingzhengqu de Guanxi [A Law Safeguarding One Country, Two Systems: A Discussion Concerning the Relationship Between the Central Government and the Hong Kong Special Administrative Region], 13 *Zhongguo Falu Kexue* [CHINA L. SCI.] 15, 19-20 (1990)).

186. See *id.* at 346.

187. See *id.*

188. See Donna Lee, *Discrepancy Between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine*, 35 *COLUM. J. TRANSNAT'L L.* 175 (1997).

189. See *id.* at 187.

190. See BASIC LAW, *supra* note 1, art. 160.

191. See Ching, *supra* note 46, at 34; see also Mufson, *supra* note 45, at A1.

192. See generally Sandra Sugawara, *China Market Set to Eclipse Its Neighbors*, WASH. POST, Mar. 18, 1996, at A1.

193. Caspar Weinberger, *Commentary: Hong Kong: Two-and-a-Half Years from China*, FORBES, Jan. 2, 1995, at 33.

194. For discussion of the relationship between the legal system and economy in Hong Kong, see de Rosario, *supra* note 44, at 18-19.

Inherent in the preservation of the common law is a greater issue of the law's relation to economic stability in China. The PRC does not have a common law system, and the concept of law under the Communist system has often been vague.¹⁹⁵ A case in point is the province of Hainan, a Special Economic Zone of the PRC. Criticized as "infrastructurally backward," Hainan's initial economic explosion has suffered due to its vague legal system.¹⁹⁶ Lack of legal stability has retarded the real estate market and discouraged most foreign investors from doing business in Hainan.¹⁹⁷ This experience may have convinced the PRC that economic and legal stability are inherently linked. The decision's acceptance of the common law system may be the result of the PRC's learning from its mistakes on the mainland in areas such as Hainan, and of a fear of ruining Hong Kong's economy if its legal system is disrupted.

Equally reassuring is the matter of jurisdiction possessed by courts in the HKSAR. While parliamentary sovereignty and the Judiciary's inability to strike down unconstitutional legislative acts may seem repugnant to American sensibilities, this is again a sign of constancy.¹⁹⁸ The old legal system is now the new legal system. Establishment of the Court of Final Appeal is still an issue,¹⁹⁹ but perpetuation of the legal system is reassuring. The citizens of Hong Kong are still subject to the same procedural rights and duties; when they enter the court system, they can reasonably expect to encounter the same institutions that were in place under British rule. International business concerns can expect to conduct their transactions pursuant to the same laws and regulations under which they did business before the transition. This constancy will support the rights of the public and foster continued economic prosperity.

The matter of the Provisional Legislative Council is less of a triumph for the maintenance of the old system in Hong Kong; however, it allows the Court to make some firm statements. The most important of these statements is that the People's Republic of China is the sovereign ruler of Hong Kong.²⁰⁰ Sovereignty is an issue in all three Justices' discussion of the lawfulness of the PLC.²⁰¹ Repeatedly, they state that the National People's Congress is the Sovereign of Hong Kong, and that the HKSAR is subject to sovereign rule from Beijing.²⁰² This appeases the

195. See Jordan, *supra* note 24, for discussion of the CCP's role in the PRC's system of law and the resultant ambiguities.

196. See Kari Huus, *One Province, No System*, FAR E. ECON. REV., June 2, 1994, at 47.

197. See *id.*

198. See *id.*

199. See Lee, *supra* note 188.

200. *Ma Wai Kwan David & Ors*, 1997 HKC LEXIS 57 at *65.

201. See *id.* at *17-20, 33-34, 52-55, 67, 74-75, 112-13.

202. See *id.* at *58-59, 102.

nationalist sentiments of the PRC administration, while clearly marking the scope of Hong Kong's domestic autonomy. The Court's affirmation of the PLC's lawfulness is not surprising. Without the PLC, Hong Kong would be without a legislature, leaving only the Chief Executive to run the Region. This would leave the legal vacuum that the PLC was designed to fill. Further, to hold the PLC to be anything but a lawful body would be perceived as defiance of Chinese rule, a move that would appear unwise in the first twenty days of PRC control.

One issue that emerges from the resolution of the PLC's lawfulness is of future concern. The PLC was implemented to serve until the First Legislative Council is formed by election, pursuant to Annex II of the Basic Law, or until June 30, 1998.²⁰³ The Court has declared it to be a legitimate and lawful body.²⁰⁴ Will it continue to be lawful if its service is extended beyond June, 1998? It is not unreasonable to consider the option that the PRC extend the PLC's authority beyond this date should the Legislative Council conform to Beijing's expectations; the uncertainty of an election would consequently be avoided. This is especially important, given Martin Lee and his Democracy Party's appeal to Hong Kong voters,²⁰⁵ and the fact that at least half of Hong Kong's voters supported Patten's reforms.²⁰⁶ Beijing is vehement in its opposition to democratization, and may use this policy to justify denial of an elected Legislative Council. By rendering such an uncompromising acceptance of Chinese sovereignty and by deferring completely to the NPC, the court may have given the Central Government the power to restrict Hong Kong's domestic autonomy even further by putting off the elections.

The ramifications of *HKSAR v. Ma Wai Kwan David & Ors* extend beyond Hong Kong. Macao is set to return to the PRC in 1999.²⁰⁷ The first two years of Hong Kong as a Special Administrative Region may be indicative of Macao's future. It is equally significant for Taiwan [ROC]. Deng Xiaoping's administration was adamant in its claims over Hong Kong, Macao, and the ROC as territories severed from China by "historical accident."²⁰⁸

The ROC and PRC can be viewed as two states, but one nation.²⁰⁹ The populations are culturally and ethnically bound together.²¹⁰ There has

203. See *id.* at *47.

204. See *id.* at *66.

205. See Pepper, *supra* note 60, at 57.

206. See Kraar, *supra* note 49.

207. See Jennifer Lin, *When Topic Is Taiwan, China Uninterested in Talk of Self Rule*, PHILA. INQUIRER, Feb. 11, 1996, at A1, D3.

208. See *Is Taiwan Really Part of China?*, ECONOMIST, Mar. 16, 1996, at 40.

209. See *id.*; see also Lin, *supra* note 207, at 23.

been increased economic integration between the PRC and ROC since the 1980s, with the result that each is a major trade partner with the other.²¹¹ Much of this trade flows through Hong Kong.²¹²

The noted case can be considered a beacon to those within the ROC who favor reunification. *HKSAR v. Ma Wai Kwan David & Ors* demonstrates the PRC's willingness to preserve the systems in place in the territories which return to its control as semi-autonomous regions. If Beijing allows the common law, the court system, capitalism, and other social and political institutions of Hong Kong to continue, would it not afford the same respect to the ROC if it returned to mainland control? This decision may be a sort of olive branch extended by the PRC to entice the ROC back into the fold.

Finally, *HKSAR v. Ma Wai Kwan David & Ors* is a testament to Deng Xiaoping's legacy and to the administration of Jiang Zemin's perpetuation of the goals and ideas of Deng.²¹³ The negotiations for Hong Kong's return, the drafting of the Basic Law, and the preparation of the colony for its new role as the HKSAR all occurred under Deng's rule.²¹⁴ The manner in which the HKSAR was formed according to the Basic Law, and the manner in which the HKSAR Court decided the issues are both in line with Deng's policy of economic modernization, combined with a continued Communist political system and his concept of "one country, two systems."²¹⁵

The impact of *HKSAR v. Ma Wai Kwan David & Ors* is far-reaching. Not only does it provide the people of the HKSAR with a declaration of what they can expect as citizens of the PRC, it extends the same sense of familiarity and constancy to the international community. Business can go on as usual. The laws and institutions of the past century will continue to apply to their transactions. Such laws and institutions have made Hong Kong into one of the financial capitals of the global economy.²¹⁶ This reassurance may ease Macao's transition from Portuguese to Chinese rule in 1999. It may also provide the reunification movement in the ROC with

210. There is a small population of indigenous Taiwanese people in the ROC, but the overwhelming majority of the ROC population is composed of mainland Chinese who fled to the island with the Kuomintang and their recent descendants.

211. See Maria Hsia Chang, *Greater China and the Chinese "Global Tribe,"* ASIAN SURVEY, Oct. 10, 1995, at 962.

212. See *id.*

213. Jiang Zemin is the current president of the PRC.

214. The extent of Deng's role in governing the PRC is unclear with respect to his latter years, due to his old age and uncertain health. Nevertheless, those officials who reputedly governed in his stead adhered to his policies until his death.

215. See WANG, *supra* note 12.

216. See de Rosario, *supra* note 44, at 18.

ammunition as it works to bring the island of Taiwan under mainland control.

The major result of *HKSAR v. Ma Wai Kwan David & Ors* is stability. Legal stability in Hong Kong is due to the survival of the common law. Political stability is derived from the Provisional Legislative Council, which has filled the void left by the dissolution of the colonial Legislative Council. Economic stability in Hong Kong, and transitively in mainland China, are the result of the preservation of the status quo in Hong Kong.

This decision is also an indication of political stability in the PRC, since it stands as a vocalization of the “one country, two systems” policy developed by Deng Xiaoping and adopted by Jiang Zemin’s administration.²¹⁷ This decision is a whispered promise of stability and prosperity for a united China to Macao and the Republic of China. On the path toward a prosperous and stable Chinese nation, this is a step in the right direction.

J. Kate Burkhart

217. See WANG, *supra* note 12.